

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM**  
**DALAM NEGERI SELANGOR EHSAN, MALAYSIA**  
**(BAHAGIAN SIVIL)**  
**GUAMAN SIVIL NO. BA-22NCVC-333-07/2018**

**ANTARA**

1. FRANCIS XAVIER LOPEZ  
(No. K/P: 561203-10-5225)
2. AGNES ELFLEDA LOPEZ  
(NRIC No. 640520-10-5574) ..... PLAINTIF-PLAINTIF

**DAN**

1. ANNIE MILDRED LOPEZ  
(No. K/P: 580413-10-5876)
2. TETUAN LOPEZ AND PARTNERS  
(disaman sebagai firma guaman) ..... DEFENDAN-DEFENDAN

**DIDENGAR BERSAMA**

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM**  
**DALAM NEGERI SELANGOR EHSAN, MALAYSIA**  
**GUAMAN SIVIL NO. BA-22NCVC-649-11/2017**

**ANTARA**

**ANNIE MILDRED LOPEZ**  
**(No. K/P: 580413-10-5876)** ..... **PLAINTIF**

**DAN**

**FRANCIS XAVIER LOPEZ**  
**(No. K/P: 561203-10-5225)** ..... **DEFENDAN**

**ALASAN PENGHAKIMAN**

**Introduction**

[1] BA-22NCVC-649-11/2017 was filed in the High Court at Shah Alam while WA-22NCVC-465-07/2016 was filed in the High Court at Kuala Lumpur. The parties applied for WA-22NCVC-465-07/2016 to be transferred to the High Court at Shah Alam to be tried together with BA-



22NCVC-649-11/2017 and was renumbered as BA-22NCVC-333-07/2018.

[2] The parties:

- 2.1 BA-22NCVC-649-11/2017 ("Suit 649") the plaintiff is Annie Mildred Lopez while the defendant is Francis Xavier Lopez.
- 2.2 BA-22NCVC-333-07/2018 ("Suit 333") the plaintiffs are Francis Xavier Lopez and Agnes Elfleda Lopez while the defendants are Annie Mildred Lopez and Tetuan Lopez & Partners.

## Background

[3] Francis Xavier Lopez ("Francis"), Annie Mildred Lopez ("Annie") and Agnes Elfleda Lopez ("Agnes") are the children of the late Manuel Campbell Lopez ("Mr. Lopez/father") and Dalcly Mary Vaz ("deceased"). The family house is at No. 35, Jalan 14/30, 41600 Petaling Jaya, Selangor ("family house"). Mr. Lopez died in 2005. The children moved out after they were married. The deceased continued staying in the said family house alone and her children and grandchildren did visit her quite regularly. The relationship between the siblings were fine then and they contributed towards her maintenance. Sometime in 2012 Annie took the deceased to stay with her for about two years then Francis brought her to stay with him for a short while. The deceased subsequently returned to the family house until 25.9.2015 when she had a fall and was hospitalised. Prior to that she had been warded a few times. She was discharged on 19.10.2015 and Annie took the deceased to stay with her until the deceased passed away on 12.11.2016. The relationship among the siblings turned sour around Christmas 2015.

[4] The deceased left three wills. The first was drawn up on 5.1.2007. The second will was drawn up on 3.9.2012 whilst the third will was allegedly made on 10.3.2016. On the same day the deceased was also allegedly to have executed a Power of Attorney ("P.A."). Both the instruments were prepared by Messrs Lopez and Partners.

[5] In the first will she appointed Francis as the trustee and executor and bequeathed 1/3 share of the said family house to Francis and 2/3 share to Annie while Agnes to receive all jewellery. As for monies in hand and accounts – 40% to Annie, 35% to Agnes and 25% to Francis and any residuary gifts to Annie.



[6] In the second will the deceased gave the family house to Francis, monies in the joint accounts to the respective joint account holder, all jewellery and any residuary gifts to Annie, and upon the demise of the deceased Francis to give Annie and Agnes a sum of RM100,000.00 each.

[7] In the alleged P.A. the deceased appointed Annie as her attorney and in the alleged third will the deceased had appointed Annie as trustee and to dispose the said family house and to distribute the proceeds of the sale, monies in all accounts and any residuary gifts equally among the siblings. In addition, the deceased gave Annie absolute discretion as when to dispose of the said family house and to distribute the residuary gifts. It is further provided that before the proceeds of the sale of the said family house be distributed, a sum of RM300,000.00 to be given to Annie to defray all cost and expenses incurred by her towards the maintenance and healthcare of the deceased since October 2015 until her death, and all other debts and funeral expenses. Annie was also given the discretion to let out the said family house pending the sale and to maintain the same and all cost for maintenance and repairs shall be borne by the proceeds of the rental and the net proceeds shall be distributed equally among them after the said property is sold.

[8] Francis applied and obtained a Grant of Probate ("Probate") on 25.1.2017 in respect of the deceased's estate based on the second will vide OS (Ex-parte) No. BA-32NCVC-787-12/2016.

[9] In Suit 333 both Francis and Agnes are disputing the P.A. and when Suit 333 was filed in the High Court at Kuala Lumpur the deceased was still alive. In Suit 649 Annie is alleging that the Probate obtained by Francis is invalid while Francis put up a counterclaim that the third is invalid and that the second will is the last will and testament of the deceased.

[10] As both instruments were executed on the same day at the same place and the making of these instruments one followed by the other are seriously challenged and the same witnesses are involved, I decide to write a single judgment. The issues raised towards the making of both instruments apply to both suits. They rely on the same set of facts which transpired on 3.3.2016 and 10.3.2016.

[11] Evidence was led by the siblings as regards their bitter relationship about a year before the death of the deceased among others who took care of the deceased most, monies being transferred without her knowledge, who spent the most on her, whom she trusted or relied on, and her state of mind.



[12] According to Annie, she never knew about the second will and was not aware that a probate was taken by Francis. She was also not aware of the first will. She found out about it while she was cleaning the family house somewhere end of 2016. She further testified that there was one incident in 17.1.2016 where she, her son Nigel and the deceased went to Francis's house to ask for the family house's keys as they could not enter the family house. She believed Francis kept the keys when the deceased was admitted to the hospital. Francis did not respond as he said the deceased never asked for them herself. Annie alleged that Francis roughed her by twisting her arm on that day. Annie, Nigel and the deceased left without getting the keys. Annie described Francis as a violent person hence beginning 24.1.2016 she told them to call before visiting the deceased at her house.

[13] Annie further testified that she believed this could have triggered the deceased to make the P.A. and the alleged third will as when they went to the church for the daily mass thereafter the deceased complained to some parishioners about Francis refusing to give the keys to the family house and someone suggested to her to consult a lawyer and gave the contact number of one Clement Gerald Lopez ("Clement") a solicitor from Messrs Lopez and Partners. Sometime in February 2016 Annie approached Clement followed by an appointment being fixed for Clement to meet the deceased. She also requested Clement to conduct a search on the family house. Clement met the deceased at Annie's house and Clement interviewed the deceased personally in Annie's presence. According to Annie the deceased explained to Clement that she could not access the family house as Francis refused to hand over the keys and that she wanted to rent it out since she was staying with Annie. Annie told the court that she heard Clement advised the deceased to make a P.A. and when Clement asked her who would be her attorney, the deceased said she wanted Annie to be her attorney. The deceased was allegedly to have instructed Clement to prepare a will where the same will replace the P.A. after she died. According to Annie at this point, Clement asked her to leave and she went upstairs.

[14] Annie further testified that on 10.3.2016 Clement with his friend one Adrian Wong ("Adrian") and a solicitor Vennila a/ Muniandy ("Vennila") came to her house. They sat with the deceased in the living room and Clement clarified certain things with the deceased and Vennila read out the contents of both the P.A. and the alleged third will. Once the deceased confirmed the contents they moved to the dining table and both instruments were executed by the deceased using her thumbprint. Clement took back the instruments and returned on 5.4.2016 and handed



them over to the deceased in a sealed envelope. After the deceased passed away, Annie instructed her solicitors to notify Francis and Agnes and extended a copy of the will to them. Not long thereafter Annie said she was informed by her solicitors that Francis had taken out a Probate based on the second will which she had no knowledge of and instructed her solicitors to challenge the said Probate.

[15] There was another incident at the church sometime on 12.6.2016 where Francis had allegedly confronted the deceased and asked her whether it was true that she did not want to see him to which the deceased denied. As regards the deceased's health Annie testified that the deceased was of old age and frail but of sound mind. She suffered from diabetes and frequently went to the hospital to be treated for bronchitis, eye problem, hip fracture and also dementia.

[16] Among the questions raised during the cross-examination were the bad blood between her and Francis which she did not deny and she admitted that there were differences between the first two wills and the alleged third will. She denied that she had imposed visiting time on her siblings. She did not deny that Francis did pay for the deceased's medical bills and personal nurse.

[17] Agnes told the court that by the time their father died, they were already married and living separately. Together they looked after the deceased as she preferred to remain in the family house. According to her Francis handled the most for her particularly on the household and deceased's medical expenses. She further testified that three of them had the keys to the family house until one day the deceased asked Francis to change the main gate lock and gave the keys to her and Francis only. According to her the deceased decided not to give Annie the key because after she was discharged from the hospital she discovered that her drawer in her bedroom where she placed her will was ransacked and the said will was not in the envelope when she saw it and the deceased had allegedly told Agnes that only Annie was capable of doing this. The deceased did not want Annie to have unrestricted access to the family house.

[18] She further testified that it was Francis who accompanied the deceased to the hospital at all times. And both of them visited the deceased regularly while Annie rarely dropped by. According to her Annie was not comfortable with their visits when the deceased was under her care and their visits were monitored. On one occasion they had to wait for two hours outside Annie's house before they were allowed in and were only able to spend about five minutes as Annie, the deceased and Nigel were leaving for the church. She testified further that she received a letter



from Messrs Lopez & Partners informing them of the P.A. where Annie was appointed as the deceased's attorney taking charge over the family house and the deceased personal effects. They were asked to hand over the family house's title, keys and other personal belongings of the deceased to Annie. And they must make appointment for their visits. This prompted both the siblings to file the action challenging the validity of the P.A.. She further testified that Francis told her that he managed to meet the deceased at the Church of St. Ignatius on 12.6.2016 and the deceased denied appointing any lawyer to make the P.A..

[19] Agnes told the court that they had asked for an appointment many times to visit the deceased but Annie never responded. The last was through their solicitors *via* a letter dated 25.4.2016 where they requested for unconditional access and this too was not responded as far as access was concerned. It was only on Friday 11.11.2016 they were informed that they would be allowed to visit the deceased on 13.11.2016. Unfortunately, the next morning they received news that the deceased had passed on. She only went on Sunday the 13<sup>th</sup> to Annie's house and attended the mass the next day but she did not attend the burial. She said Annie had borne the funeral expenses because when their father died Annie did not contribute any money.

[20] Francis testified that after their father retired, being the eldest he helped his parents financially to maintain the household. He told the court that the deceased told him that Agnes did contribute towards the deceased's expenses but Annie hardly did. After their father died, Francis claimed that he took care of the deceased's financial needs including her medical expenses. The deceased was staying alone and both Agnes and himself visited the deceased regularly but not Annie. The deceased's health deteriorated in 2015 where she was hospitalised in March 2015 for acute bronchitis and hypertension. She was also suspected of suffering from dementia. The deceased was again hospitalised the following month for infection and warded for 8 days. The deceased was treated for behavioural and psychological symptoms. In September she had a fall and fractured her pelvis bone. While warded, the deceased was disruptive and unstable. The doctors said she was suffering from dementia.

[21] According to Francis, when the deceased was discharged on 10.10.2015 the siblings discussed and Annie offered to take care of the deceased and Francis agreed to pay for a professional nurse to attend to the deceased. Francis claimed from that not long thereafter on Christmas Day he visited the deceased but felt unwelcome as he found out that he was not invited to the Christmas lunch held by Annie. And from that day



onwards their relationship turned sour. He said that the deceased was under Annie's control and Agnes and him had difficulty accessing to the deceased. He thereafter stopped paying for the nurse.

[22] On 17.1.2016 he told the Court that Annie, her son Nigel and the deceased came to his house. Annie asked for the keys to the family house. He did not give the keys to Annie because the deceased did not ask for them herself and then they left. Francis denied any fracas between him and Annie. On 24.1.2016 Francis and Agnes went to visit the deceased but could only be with her for about five minutes after waited for two hours at the gate. According to Francis, Annie told them to make an appointment before coming to visit the deceased. Thereafter they had sent three emails in February to Annie for an appointment and received no response.

[23] Francis and his wife on 30.3.2016 attempted to visit the deceased. According to Francis he stood at the gate and saw Annie outside her house and when Annie saw him, Annie quickly went into her house and shut the door and pulled up the curtains. Francis called out for the deceased and heard the deceased saying "who is that". Francis claimed that Annie started shouting so that the deceased would not be able to hear him calling her. Francis then left.

[24] Francis testified further that on 7.4.2016 he received a letter from Messrs Lopez & Partners informing him of the alleged P.A. where among others he and Agnes must make an appointment to visit the deceased. Francis attempted to visit the deceased again on 12.6.2016 and when he reached Annie's house he saw Annie was helping the deceased into the car with Nigel. Francis and his wife Pamela Mavis Miranda ("Pamela") decided to follow them. At the Church of St. Ignatius they waited until the mass was over and when the deceased came out Francis approached the deceased and said that the deceased was happy to see him and asked him where had he been and they embraced each other. Francis then asked her whether she had appointed any lawyer to give Annie the P.A. to which the deceased replied that she would never do that and immediately thereafter Annie came and pulled the deceased away.

[25] Francis and Agnes were not able to visit the deceased until 11.11.2016 after several exchanges of correspondence between their solicitors. They were informed that they could visit the deceased on 13.11.2016. Unfortunately, the deceased passed away on 12.11.2016. Francis attended the funeral. Two weeks later he received the second will and instructed his solicitors to apply for probate and obtained the Grant of



Probate on 25.1.2017. It was only on 3.2.2017 while he was cleaning his car he saw an envelope which he had collected from the post office on 20.1.2017 and opened the same and came to know about the existence of the alleged third will. Thereafter he and Agnes filed the action challenging the validity of the P.A. while Annie initiated Suit 649 challenging the probate. Francis claimed that the deceased could not have executed the alleged third will on her own free will and/or at the material time she was of unsound mind and/or the alleged third will was procured without her instruction. He told the Court that the deceased never trusted Annie because she had once ransacked the deceased's drawer and removed her collection of China glassware. There were many occasions where she was upset with Annie and when the gate lock was changed she told Agnes not to give Annie the key. According to him the deceased had no reason to appoint Annie as her attorney and would not have executed the alleged third will.

[26] Annie called Clement, Vennila, Adrian and Dr. Deva Dass a/l N. Gopal Pillay ("Dr. Deva") as her witnesses while Francis and Agnes called Pamela, Dr. Chen Queen Liung ("Dr. Chen"), Dr. AH Lee ("Dr. Lee") and Dr. Pall Singh a/l Teja Singh ("Dr. Pall") whose testimonies shall be dealt with as I discuss the issues below.

### **Suit 333**

[27] Francis and Agnes in their statement of claim allege that the deceased did not appoint Clement to prepare the alleged P.A. and the alleged P.A. is not genuine, forged and/or was drawn up by Annie aided by Clement. They further plead that the deceased had no knowledge of it and/or she was deceived into making the same. And this was premised upon the fact that she was allegedly to have told Francis at the Church of St. Ignatius that she had never appointed any solicitor nor did she appoint Annie as her attorney.

[28] The learned counsel for Francis and Agnes points out that from the evidence led, the deceased trusted and relied on Francis after her husband died. Both of them had joint account and joint safe deposit box. Francis managed her finance and took her to the hospitals for check-ups most of the time. This is evidenced from the first two wills where Francis was appointed as the executor and trustee. In fact, according to the learned counsel the deceased bequeathed the family house to Francis absolutely. In the said will she recognised Francis's sacrifices. She further submits that the second will is not disputed by Annie as it is in Part A document. It is further submitted that Annie was never trusted by the





deceased and Annie could not even produce a single receipt to prove that she had expended monies towards the deceased's care and maintenance.

[29] She points out further that when the deceased was discharged from Hospital Assunta on 19.10.2015 Francis willingly agreed to pay for the professional nurse to assist Annie as they decided that the deceased to move in with Annie. Annie sudden change of attitude during Christmas was when the bitterness came. Access to the deceased was restricted. Then came the alleged P.A.. This led to the planned ambush at the Church of St. Ignatius and there the deceased had allegedly told Francis that she never appointed any lawyer. The learned counsel submits that the fact that the deceased denied appointing Clement or executed the P.A. should be accepted. Annie ought to have called evidence to deny that this took place. Her son Nigel was standing next to the deceased and he should have been called to refute Francis's evidence. The learned counsel further submits that the evidence shows that the deceased had a sharp mind and she could have told Francis and Agnes that she did not want them to visit her regularly. She urges this Court to draw an adverse inference against Annie and Clement and cites the case of ***Kumpulan Prasarana Rakyat Johor Sdn Bhd v. Emercon Bina Sdn. Bhd & Another Appeal [2021] 1 MLJ 629.***

[30] The learned counsel urges this Court to consider the fact that when Suit 333 was filed, the deceased was still alive. There was no evidence tendered showing the deceased appointed Clement for example, no warrant to act, notes or correspondence, evidence of invoice or payment or statutory declaration from the deceased. In support of her contention she referred to ***Lee Kuang Guat (suing as the father of the deceased, Lee Chiu Ling v. Chiang Woei Chien (practising as Chiang Chambers, Advocates & Solicitors [2020] MLJU 2394.*** She further submits that Clement applied to strike out Suit 333 and albeit the deceased was still alive at that point of time no affidavit from the deceased was filed.

[31] In response, the learned counsel representing Annie argues that the P.A. is revocable as stated therein upon the demise of the deceased. The deceased died on 12.11.2016 hence, pursuant to the ratifying clause and section 5 of the Powers of Attorney Act 1949 the P.A. is revoked. Therefore, he submits that the declarations sought by Francis and Agnes for the P.A. to be null and void and to be deregistered from the High Court records can no longer be sustainable and in fact Suit 333 should be



rendered academic. In support of this contention he refers to ***Panchanath Ratvavale v. Sandra Segara Mahalingam & Ors [2012] 5 MLJ 109.***

[32] He further contends that Francis and Agnes have no locus to question the appointment of Clement by the deceased as it is privilege communication or solicitor-client relationship and it is not pleaded that Clement did not meet the deceased. He submits that all requirements under the Powers of Attorney Act 1949 had been satisfied. It is further submitted that the mental state of the deceased on 3.3.2016 and 10.3.2016 is not an issue in Suit 333. Francis and Agnes allege that she had always penned her signature and never used her thumbprint but they failed to challenge the authenticity of the deceased's thumbprint.

[33] As for the need for the P.A. the learned counsel refers to the 17.1.2016 incident where the Francis refused to give the family house keys when the deceased and Annie came to ask for them and Annie was roughed by Francis. Annie took care of the deceased after she was discharged since October 2015 and Francis only paid for the professional nurse for three months. The deceased could not access the family house. The learned counsel further submits that Francis and Agnes claimed they have witnesses to the church incident but none was called. With regard to access or visits the learned counsel contends that Annie never prohibited Francis and Agnes from coming but they always came unannounced and at odd times.

[34] It is further submitted that Francis and Agnes have not shown any evidence to suggest that the P.A. is not genuine, forged and/or drawn up by Annie aided by Clement.

[35] The learned counsel representing Clement submits that Francis and Agnes have failed to bring any evidence to prove that Clement was not appointed by the deceased. On the contrary, she argues that Clement has testified that he was appointed and interviewed the deceased on 3.3.2016 himself. And he was authorised to issue the letters dated 7.4.2016, 12.4.2016 and 20.5.2016. Clement's evidence was supported by two others namely Vennila and Adrian. Therefore, she submits that as far as Clement is concerned his evidence is corroborated.



[36] She points out that Francis and Agnes failed to call any witness whom they alleged to have heard what the deceased told Francis at the church. She invites the Court to draw an adverse inference under section 114(g) of the Evidence Act 1950 against them since their pleaded case is that the deceased neither had executed any P.A. nor appointed any lawyer. Hence, she submits that the Court may presume that the deceased never made such denial.

[37] The learned counsel further contends that all requirements to create the P.A. were met and it was duly registered and therefore she submits that the said instrument is valid and enforceable. It follows therefore that Clement was authorised to issue the said letters as instructed by the deceased.

[38] It is her further submission that since the deceased had passed on the P.A. is revoked pursuant to section 5 of the Powers of Attorney Act 1949. This would render the declarations sought by Francis and Agnes irrelevant and academic. In addition, she points out that at the time when Suit 333 was filed in Kuala Lumpur High Court the deceased was still alive and the deceased was not made a party to enable her to file an affidavit. Francis and Agnes at that material time had yet to become the legal or beneficial owners of the properties belonging to the deceased. Thus, she submits that they have no locus standi to file Suit 333. In support of her contention she refers to **Norzian bt Joya & Ors v. Kamizah bt Joya & Ors [1026] 9 MLJ 206**.

## Findings and decision

[39] In paragraphs 25 and 26 of their statement of claim Francis and Agnes plead as follows:

- “25. Berkenaan dengan perlantikan Defendan Kedua itu, Plaintiff-Plaintif mengatakan bahawa Puan Dalcy telah memberitahu Plaintiff-Plaintif bahawa Puan Dalcy tidak melantik mana-mana peguamcara dan beliau tidak menghalang Plaintiff-Plaintif dengan memberikan hak kepada Defendan Pertama. Plaintiff-Plaintif telah berjumpa dengan Puan Dalcy secara terkejut di Gereja, Church of St. Ignatius, Kelana Jaya, Petaling Jaya pada 12.6.2016 dan pada masa itulah, Plaintiff-Plaintif diberitahu oleh Puan Dalcy bahawa beliau tidak mengeluarkan apa-apa Power of Attorney kepada Defendan Pertama dan tidak melantik mana-mana peguamcara. Perbualan ini disaksi oleh beberapa orang yang hadir pada



masa itu dan juga isteri Plaintiff Pertama. Mereka juga akan dirujuk di perbicaraan kelak.

26. Oleh yang demikian, Plaintiff-Plaintiff akan mengatakan di sini bahawa, PA bertarikh 10-3-2016 itu adalah tidak tulen, palsu dan/atau dikeluarkan oleh Defendan Pertama dengan pertolongan Defendan Kedua secara tidak sah dan/atau secara tanpa pengetahuan sebenar Puan Dalcy dan/atau secara tipu muslihat.”.

[40] I shall first address the incident at the church. It is incorrect to say that Francis failed to call any evidence to support his allegation. Francis's wife Pamela took the stand and testified that she heard the deceased denied appointing any lawyer or made the P.A.. The learned counsel for Annie during cross-examination questioned her credibility in that she had made an earlier witness statement which omitted the incident on 17.1.2016. This incident was added in her amended witness statement which she relied as her evidence-in-chief. But it must be noted that in her earlier witness statement marked as P38 she did say what took place at the church on 12.6.2016 and the same evidence can be found in her amended witness statement. Be that as it may the issue remains whether she is credible because the incident on 17.1.2016 is equally important.

[41] She was at home when Annie, the deceased and Nigel came to her house on 17.1.2016 and was present throughout the incident where Annie claimed that she was roughed by Francis and hurt her arm. Pamela denied that this happened. In fact Annie was challenged during cross-examination specifically on this assault. Annie was asked to produce a medical report when she said she went to see a doctor and Annie produced a medical report dated 20.1.2016 marked as D9 and a police report regarding the assault dated 25.1.2016 marked as D17. Pamela denied that the assault took place. Annie denied that it was an afterthought when she was cross-examined as to the delay in making the police report.

[42] I cannot accept Pamela's evidence denying that the assault took place. Besides the medical and the police report, there is an independent circumstantial evidence which came from Agnes. According to Agnes when she and Francis went to Annie's house to visit the deceased on 24.1.2016, Annie had her hand in a sling. And this was about 7 days after the assault. Hence, I find that Pamela is doubtful when she said she heard what the deceased said to Francis on 12.6.2016. Therefore, I should treat her evidence as suspect and unsafe to rely on her solely. I am of the view



that there should be independent corroboration to support Francis's evidence.

[43] Further burden is on Francis to prove that the deceased did not make the P.A. and did not appoint Clement or any other lawyer for that matter since he wants this Court to believe the deceased told him so. As such any corroborative evidence should come from independent witnesses for example the Bok's family as they were mentioned by Pamela. Pamela in her witness statement said the Bok's family witnessed the incident and they appealed to Annie and Francis to have compassion when Annie was allegedly pulling the deceased away from Francis. However, Francis and Agnes chose not to call them and strangely Francis during cross-examination said he did not approach the Bok's family to ask them whether they heard what the deceased said. Clearly both Pamela and Francis contradicted each other on a material fact.

[44] I also find that Francis and Agnes are not able to demonstrate why they alleged that the P.A. is not genuine or forged. Clement, Vennila and Adrian were rigorously cross-examined. I find that they are credible witness and have nothing to gain. They are not related to the deceased. Clement did not know Annie or the deceased prior to being engaged. Adrian did not know Vennila prior to 10.3.2016. He is Clement's acquaintance. There is no evidence to suggest that they conspired with Annie. There is also no evidence to suggest that the P.A. was drawn up by Annie. It is important to note here that the deceased's mental capacity was not challenged in respect of the making of the P.A.. I do not find any suspicious circumstances to indicate that the deceased did not know the nature of the document which she had put her thumbprint on i.e. the P.A..

[45] I also do not agree with the learned counsel for Francis and Agnes that Annie and Clement could have filed an affidavit by the deceased to support the application to strike out Suit 333 when it was still in the Kuala Lumpur High Court. That cannot be taken against them. In fact Francis and Agnes at the time of filing Suit 333 in Kuala Lumpur High Court have no locus as the deceased was still alive. They were yet to be beneficiaries.

[46] Apart from the above finding, I agree that P.A. is revoked upon the demise of the deceased pursuant to the ratifying clause and section 5 of the Powers of Attorney Act 1949. The reliefs sought in Suit 333 are academic. Therefore, based on the foregoing reasons I dismiss Suit 333 with costs.



## Suit 649

[47] The learned counsel for Annie submits that the alleged will has satisfied all requirements laid out in section 5 of the Wills Act 1959. The witnesses to the making of the third will had testified that the deceased herself wanted to make the said will and the contents were explained to her. She chose to use her thumbprint instead of signing it as she was not strong enough to grip a pen. He argues that there was nothing to suggest that she was made to thumbprint the alleged third will against her will or she was deceived into putting her thumbprint on it. The learned counsel refers to ***Low Chee Choy v. Tok Siew Leng & Anor [2016] MLJU 1666*** where in absence of evidence to the contrary the court accepted the evidence of the witnesses present during the execution of the will and urges this Court to accept the evidence of Clement, Vennila and Adrian.

[48] It is further submitted there was no suspicious circumstances surrounding the making of the alleged third will. He argues that Francis wants the Court to accept his evidence as regards the brief conversation he had with the deceased therefore the burden is on Francis to prove that the deceased did tell him that she did not appoint any lawyer or make any P.A.. Francis chose not to call the Bok's family therefore his evidence is not corroborated and I do not accept that the deceased did tell him that.

[49] The learned counsel points out that Francis in his defence alternatively alleges that the deceased at the material time was suffering from mental illness or insane delusion therefore had no testamentary capacity. Evidence was adduced through Dr. Chen a Geriatrician that the deceased was suffering from dementia. It is submitted by the learned counsel that dementia was never pleaded. There was no evidence suggesting that the deceased was shown to display forgetfulness or being absent minded on any occasion. Be that as it may the learned counsel submits that Dr. Chen herself could not confirm that the deceased was suffering from dementia. She never interviewed the deceased personally.

[50] He further argues that one Dr. AH Lee ("Dr. Lee") a psychiatrist was called to testify that the deceased was suffering from mental disorder. However, Dr. Lee said when he observed the deceased from 6.10.2015 – 10.10.2015 her condition had improved. He described that the deceased's mood was cheerful, fairly good memory, mentally stable, rational in her speech and oriented. Therefore, the learned counsel submits that the deceased did not suffer any mental illness or insane delusion.



[51] The learned counsel then refers to the evidence of Dr. Deva another psychiatric who testified for Annie that when he examined the deceased on 22.5.2016 and found that the deceased was not suffering from any mental disturbance. Dr. Deva testified that the deceased's state of confusion and erratic behaviour earlier were due to the blood infection and the fracture. The learned counsel points out that even Dr. Chen agreed with this opinion. Hence, he submits that the deceased had the testamentary capacity in making the alleged third will on 10.3.2016.

[52] The learned counsel for Francis points out that the Grant of Probate was issued based on the second will and Annie does not challenge its validity. Therefore, she submits that the Probate obtained by Francis is valid.

[53] As regards the alleged third will, she submits that the burden will only shift to Francis once Annie has proven that the deceased had the testamentary capacity and dispelled any suspicious circumstances surrounding the making of the alleged will.

[54] It is her submission that on 3.3.2016 when the deceased allegedly gave the instruction to Clement and on 10.3.2016 when the alleged third will was executed, Annie has failed to discharge the necessary burden. The learned counsel refers to the evidence of Dr. Chen, Dr. Lee and Dr. Pall. Dr. Chen found the deceased was suffering from acute psychosis due to dementia when the deceased was hospitalised from 25.9.2015 – 19.10.2015. Subsequently Dr Lee treated the deceased and diagnosed the deceased as suffering from dementia and she was psychotic and confused. Dr. Pall who treated the deceased for the botched eye surgery found her to be uncooperative and moving all over the places. And Dr. Pall had difficulty communicating with her.

[55] The learned counsel contends that Annie did not lead any evidence as to the deceased health and mental condition after 19.10.2015 until 10.3.2016 the day the alleged third will was executed. Hence, it is her submission that Annie has failed to prove that the deceased had the testamentary capacity to make the alleged will. She refers to ***Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2005] 2 MLJ 1*** where the Federal Court held that the burden to prove testamentary capacity was on the propounder.



[56] The learned counsel refers to the evidence adduced in respect of 3.3.2016 when the instruction was allegedly given to Clement and 10.3.2016 when the third will was allegedly executed. According to her Clement failed to adduce independent evidence that he was engaged by the deceased or Annie. She argues that Clement failed to establish from the questions he posted to the deceased that the deceased was of sound mind. There was no doctor present to ascertain that the deceased was of sound mind.

[57] The learned counsel refers to the photographs taken on 10.3.2016 and argues that when the deceased put her thumb on both the P.A. and the alleged third will Vennila was holding her thumb. She submits that the deceased did not thumbprint the instruments voluntarily or was not aware what she was doing.

[58] It is further pointed out that the practice copy for thumbprinting was different from the original copy and there were errors and the practising copy was even attested. She submits that all these would raise suspicion which Clement and Annie failed to dispel.

[60] The learned counsel urges this Court to accept the second will as it was properly executed and the solicitors involved were the deceased's niece. And Annie never challenges that the second will is invalid. Further she submits that the contents of the alleged third are heavily in favour of Annie as opposed to the second will which was more sensible.

## Findings and decision

[61] It is trite that the burden rests on the propounder of the will to establish that the deceased had the testamentary capacity and to dispel any suspicious circumstances surrounding the making of the will whilst the one challenging the said will shoulders the burden of proving any vitiating elements in the making of the same. In **Gan Yook Chin** (*supra*) Steve Shim CJ (Sabah & Sarawak) at pp.11-12 had this to say:

“[16] It is trite law that for a will to be valid, a testator must have testamentary capacity. Whether a testator has testamentary capacity depends on the facts of each case. What is meant by testamentary capacity has been laid down by Chief Justice Cockburn more than a century ago in *Banks v Goodfellow* (1870) LR 5 QB 549. This case was cited copiously by the Court of Appeal in the instant case. For the sake of emphasis it is appropriate to repeat the sentiments expressed by Cockburn CJ who said *inter alia*:





'It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made ... In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of ....'.

[17] Given such sentiments, counsel for the appellants submitted that the Court of Appeal proceeded to make the unusual proposition that only mental disorder or insane delusion could vitiate a will. This is quite incorrect. What the Court of Appeal actually said is this: 'What the law primarily looks for as vitiating testamentary capacity is mental disorder or insane delusion'. We should emphasise on the word 'primarily'. In any event, that proposition must have been stated in the context of the sentiments or observation expressed by Cockburn CJ in *Banks v Goodfellow*. There is no flaw in the Court of Appeal's proposition.

[18] The Court of Appeal held that the time for determining the mental capacity of the testator who made the will was the time when the will was executed. The court cited various authorities including *Billinghurst v Vickers* (1810) ER 956; *Choo Ah Pat v Chow Yee Wah* [1974] 1 MLJ 62; *R Mahendran v R Arumuganathan* [1999] 2 SLR 579. *Theobald on Wills (15th Ed)* was also relied on, in particular at p 32 which stated that 'the testator must have testamentary capacity at the time he executes the will'. *Banks v Goodfellow* was cited as a footnote. In our view, that is the correct statement of the law.

[19] As regards the burden of proof, the Court of Appeal quite rightly stated the settled law, ie that where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will."

And the Court of Appeal in ***Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 MLJ 97** Gopal Sri Ram JCA (as His Lordship then was) at pp.100-101 said:

"Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator.



What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making of the will. This will include insanity at the time of the making or giving instructions for the making of the will.”.

### **Deceased's testamentary capacity**

[62] Dr. Deva who testified for Annie examined the deceased on 22.5.2016 some two months after the third will was allegedly executed. He is a familiar figure to the deceased's family as he treated the late Mr Lopez who suffered from major psychiatric illness from 1982 until his demise in 2006. Dr. Deva prepared a report dated 22.5.2016 and told the Court that based on her medical history the deceased was then in a confused state and delirious. This was due to her poor health as she had diabetes, hypertension and lung infection. She subsequently had a fall causing a fracture of the right pubic rami and the operation to remove the cataract in left eye had some complications. She was under constant medication.

[63] According to Dr. Deva when he interviewed her the deceased was calm and able to interact well in English and Malayalam. She was focused and able to talk about her feelings about her life and the family house which she wanted Annie to manage. Dr. Deva concluded the deceased had no memory issue and cognitive impairment. From his observation the deceased had no Alzheimer type of dementia.

[64] Dr. Chen apparently agreed with Dr. Deva's opinion that the deceased confused state of mind and erratic behaviour were due to her health condition. Dr. AH Lee examined the deceased on 26.9.2015 some five months before the third will was allegedly executed. He went through her old medical files and visited her in the ward the next day and was told by the nurse that the deceased was moody, occasionally uncooperative and was not able to sleep and noisy. Nevertheless, he found her to be mentally alert but depressed.

[65] He further obtained some information from Francis and made a provisional diagnosis of dementia with agitated depression and prescribed the necessary medication. Dr AH Lee also managed to obtain further information from Annie and opined that the deceased was having delirium (an acute confusional state) and dementia and replaced the medication. Dr. AH Lee further testified that with the antipsychotic medication the deceased condition improved in that she was rational in her speech, calm and her memory was fair. From 6.10.2015 until 10.10.2015 Dr AH Lee described the deceased as fairly cheerful, improved memory, chatty, mentally stable, oriented and rational in speech and she was accordingly



discharged. He diagnosed her as having dementia and the psychotic medication dose was reduced and the deceased was also prescribed with medication for dementia.

[66] The deceased last encounter with a doctor was 8.1.2016 about two months before the third will was allegedly executed. Dr Pall treated her for the botched eye surgery. She was uncooperative and moving around. The sutures could not be removed and he was not able to communicate with the deceased.

[67] It is not disputed that there is no medical evidence as to her health or mental condition on 3.3.2016 and 10.3.2016. This Court is left with the evidence of the witnesses namely Clement, Adrian and Vennila. As far as from the medical side is concerned Dr. AH Lee and Dr. Deva would be to my mind the best evidence to be considered. Both are psychiatrist. Having considered their medical reports and oral testimonies I have no reservation in concluding that the deceased was not suffering from any mental illness or insane delusion.

[68] Annie in her reply to the defence and counterclaim denies that the deceased was suffering from any mental disturbances, insane delusion or mental disorder as alleged by Francis. Dr. Deva examined the deceased on 22.5.2016 whilst Dr AH Lee started his treatment and observation on the deceased from 26.9.2015 until 10.10.2015. It cannot be disputed that from their testimonies they did not conclude or opine that the deceased was suffering from any mental illness or disorder or insane delusion. In fact according to Dr AH Lee the deceased's condition improved with the medication. There was no suggestion that she had stopped taking the medication prescribed by Dr. AH Lee. Annie was never cross examined on this.

[69] No dispute as regards her frustration with the eye surgery. Being old and frail and according to Dr. Deva she had limitations in sights. It is also not disputed that the eye surgery she had to remove the cataract caused some complications. Dr. Pall could not do any corrective surgery because she was uncooperative and "moving all over the places" but there was nothing to suggest whether she was mentally ill at that material time. Dr. Deva who met and examined her in May 2015 also ruled out any mental illness. Therefore, I am satisfied that Annie has on the balance of probabilities proved that the deceased had the testamentary capacity to execute the 3<sup>rd</sup> will.



## Suspicious circumstances

[70] The bitter relationship between the siblings in particular Annie and Francis is too obvious. According to Francis it began sometime during Christmas 2015 when he and Agnes were not invited to the Christmas lunch at Annie's place. When he was there he saw some guests were arriving. He did meet the deceased and he described her condition as better and able to move around independently. Annie was not happy with his presence. Thereafter he stopped paying for the nurse.

[71] Thereafter, the incident on 17.1.2016 when Annie, the deceased and Nigel came to Francis house to get the keys. Francis said he did not give the keys because it was Annie and not the deceased who asked for them. Annie alleged that she was assaulted by Francis and I have dealt with this earlier in my judgment. Then, the incident at the Church of St Ignatius on 12.6.2016 which I have considered too earlier.

[72] Perhaps I should say this again that the parties agreed that both trials to be heard together. The facts that are heavily in dispute those transpired on 3.3.2016 and 10.3.2016. Allegation of mental illness or insane delusion or dementia was not the pleaded case of Francis and Agnes as regards the making of the P.A.. In contrast, for the making of the third will on the same day, Francis in his counterclaim puts up an alternative plea that at the time when the instruction was given to Clement and when the third will was allegedly executed the deceased was suffering from mental disturbance or insane delusion. At the same time Francis in Suit 649 wants this Court to accept what the deceased had told him on 12.6.2016. Dementia is not his pleaded case in both suits. Even if it is relevant there are various stages of dementia and Dr. Chen described her as having a mild dementia. Dr. AH Lee who examined her subsequently said the deceased's condition had improved.

[73] There is another piece of evidence which I cannot disregard and it is highly relevant in dismissing Francis's counterclaim. This came from Francis himself. He told the Court that on 30.3.2016 about twenty days after the third will was executed he tried to visit the deceased and when he called out for the deceased he heard the deceased asked "who is that". This piece of evidence certainly does not held Francis's claim that the deceased was suffering from mental disturbance or insane delusion some twenty days earlier. Hence, I hold that the deceased at the time of giving the instruction and executing the third will was not suffering from any mental disturbance or insane delusion. Francis has demolished his own defence and counterclaim.



[74] As far as Annie is concerned, I could not find any evidence suggesting any undue influence being exercised by her onto the deceased. She has on the balance of probabilities dispelled any suspicious circumstances surrounding the making of the third will. I have accepted the evidence of Clement, Vennila and Adrian in deciding that the P.A. was validly executed and I hold the same in respect of the making of the third will.

[75] In attempting to show evidence which would vitiate the will, I have considered the evidence with regard to the thumbprint. I accept that it was at her behest that she would use her thumbprint instead of signing it.

[76] As regards Annie's failure to challenge the validity of the second will, the answer lies in section 14 of the Wills Act 1959 which provides:

"No will or any part thereof shall be revoked otherwise than as aforesaid, or by another will executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

As I accept the validity of the third will, the second will is therefore revoked.

[77] There is no requirement that the will should be signed at the foot of every page. I also do not find the missing page no.2 and the word 'and' being repeated twice in the third will of any material significance as the intention of the deceased in paragraph 3 is clear and unambiguous.

[78] Based on the aforesaid reasons, I dismiss Suit 333 and allow Suit 649 and dismiss the counterclaim with costs.



**(TUN ABD MAJID BIN TUN HAMZAH)**  
**Hakim**  
**Mahkamah Tinggi Malaya, Pulau Pinang**  
**Tarikh: 6 September 2022**



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